88-445

Supreme Court, U.S.
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NO. -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PAUL and ANNA BROAD,
Petitioners, Pro Se
v.

WILLIAM F. CONWAY; ROBERT H. ISEMAN;
DeGRAFF, FOY, CONWAY, HOLT-HARRIS & MEALEY
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ORDER UPHOLDING THE ORDER FOR SUMMARY JUDGEMENT BY U.S.DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK

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QUESTIONS PRESENTED FOR REVIEW

1. Does an attorney have the right to make false allegations before a presiding judge to the effect that his client continually insisted that the attorney misuses the legal process, and falsely to accuse his client before the judge that his client intends to use the witness stand to accuse the police and other city and county officials of conspiracy to cover up a murder, in order to obstruct justice and to coerce the client into a settlement, when the client rejects any settlement and insists on a trial?

2. Is it not an abuse of discretion for a judge to refuse a litigant's demand for

postponement of a trial in order to replace his attorney, when the litigant accuses his attorney, before the court, of becoming a party to a conspiracy to cover up a murder?

LIST OF PARTIES

Paul and Anna Broad - Petitioners

1. William F. Conway
2. Robert H. Iseman
3. DeGraff, Foy, Conway, Holt-Harris & Mealey

- Respondents

TABLE OF CONTENTS

		PAGE
QUESTIONS PRESENTED FOR REVIEW		i
LIST OF PARTIES		iii
TABLE OF AUTHORITIES		vi
OPINIONS BELOW		2
STATEMENT OF JURISDICTION		3
CONSTITUTIONAL PROVISION INVOLVED		4
STATUTE INVOLVED		6
STATEMENT OF THE CASE		7
A.	1. Police Failed to Act	7
	2. Accusations by Channel 6	7
	3. Refusal to retract	8
	4. Libel suit	9
	5. Rejection of any settlement	10
	6. Coercion by attorneys	10
	7. Suspicion	11
	8. Prejudicing the court	12
	9. Rule 1.16(a) of A.B.A.	15
	10. Establishing lies	16
	11. Call into Judge's Chambers	17
	12. Request Trial Postponement	19
	13. Second Call into Chambers	19
	14. Demand for Stenographer	21
	15. Accusations of coercion and conspiracy	21
	16. Coerced procedure	24
	17. Abuse of discretion	25

18. Public denunciation 26
B. LAWSUIT AGAINST ATTORNEYS 26
C. SUMMARY JUDGEMENT 27
D. APPEAL 27
E. ORDER UPHOLDING SUMMARY JUDGEMENT 28
F. MISAPPLICATION OF RULINGS 28
H. COURT RULINGS 29
1. On Coercion 29
2. On Malpractice 31
3. On Summary Judgement 34
4. On Jury 35
5. On Malice, gross irresponsibility 36
I. ATTORNEY'S ROLE 39
J. COERCION TO ACCEPT THE MONEY 40
K. RELATED CASE 41
L. REASON FOR GRANTING WRIT 42
The petition should be granted for:
a. Service to Justice
b. Due process of Law
c. Rectifying the Wrong done to Us by our Attorneys
d. Detering unethical and unlawful practices by some lawyers.
M. CONCLUSION 43

*****

APPENDIX:

1. ORDER OF THE COURT OF APPEALS
2. TIME UNION ARTICLE
3. LETTER TO MR. CONWAY OF 7-29-84
4. COMPLAINT
5. NOTICE OF APPEAL
6. LETTERS OF MAY 6th AND AUGUST 6th,1986
7. ORDER FOR SUMMARY JUDGEMENT

TABLE OF AUTHORITIES

CASES	PAGE
1. Arkwright Mut. Ins. Co. v. Philadelphia Electric Co. C.A. Pa. 1970, 427 F. 2d 1273	35
2. Butts v. Curtis Publishing Co. CIV. A. No. 8311, U.S.D.C., N.D. Ga, Atlanta Div.	36
3. Douglas v. Hustler Magazine, Inc. 607 F. Supp 816 (D.C. 2d. 1984)	38
4. Field v. Turner 1955, 1 Misc. 2d 679,147 N.Y.S. 2d 542	17
5. Fiske v. Buder C.C.A. Mo. 125 F. 2d 841	33
6. Foulk v. Awere, Inc. 35 Misc. 2d 302, 315, 317	36
7. Hull v. Brandywine Fibre Products Co. D.C. Del. 1954, 121, F. Supp. 108	29
8. Jacobsen v. Overseas Tanks Corp. D.C.N.Y. 11 F.R.D. 97	33
9. Jeroslovicz v. Sedman C.A.N.Y. 195 528 F. 2d 727	34
10. Kothe v. Smith 771 F. 2d 667 (1985)	30

11. Lynch v. New York Times Co. 37
171 A.D. 399,401,157,
N.Y.S.392,393

12. Miller v. Hulsey 16
D.C.Ark. 1972,
347 F. Supp. 192

13. Oglesley v. Terminal 35
Co., Inc. C.A.Ga 1976
543 F 2d 1111

14. People v. Lubie 17
172, 334, N.Y.S. 2d 497,
70 Misc. 2d 713

15. Preveden v. Hahn 33
36 F. Supp. 952

16. Redhouse v. Quality Food Sales, 29
Inc. C.A.Utah 1975
511 F. 2d 230, 523, F. 2d 1

17. Skinner v. Stone 32
724 F 2d 264 (1983)

18. Stone v. Bonner Publishing Co. 39
87-CIV 84, 87, CIV 85,
U.S.D.C. VT

19. Time Inc. v. Firestone 36
96 S.CT 958 (1976)
424 U.S. 448, 47 L.Ed 2d 154

20. Titsworth v. Mondo 34
407 N.Y.S. 2d 793

21. Werrick v. C.I.R. 33
173 F. 2d 905

22. A.B.A. Rules of Professional 15
Conduct

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OPINIONS BELOW

The order of the Court of Appeals affirming the order of the District Court is included in Appendix (1a).

The opinion of the District Court is reported at 675 F. Supp. 768 (N.D.N.Y. 1987). (7a).

STATEMENT OF JURISDICTION

The order of the Unites States Court of Appeals for the Second Circuit was issued May 19th 1988 (1a). This petition has been filed within ninety days of that order.

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. paragraph 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

1. The First Amendment to the United States Constitution provides in pertinent part:

> ..."or abridge the freedom of speech"...

2. The Seventh Amendment to the United States Constitution provides in pertinent part:

> ..."the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise reexamined in any Court of the United States."

3. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ..."nor shall any State deprive any person of Life, Liberty or property without due process of Law; nor deny to any person within its jurisdiction of equal protection of the Law."

STATUTE INVOLVED

The Civil Rights Act of 1871, c.21, paragraph 1, provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this Section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statue of the District of Columbia.

42 U.S.C. 1983.

STATEMENT OF THE CASE

On November 2nd, 1981, we went to the Albany, New York, Police and expressed to Captain Lynch our concern about the safety of our daughter, Elena Zhilinskaya. Twelve days later, she was murdered. The Albany Police failed to conduct an investigation of Zekria Latifi, her murderer, and to take steps which would have prevented the murder. Others have also had problems with the Albany Police and the District Attorney (2a).

On November 16th, 1981, WRGB-TV (Channel 6) Schenectady, New York, broadcasted a report by Judy Sanders, their TV reporter, on their regular 6:00

P.M. and 11:00 P.M. News, a report about the death of our daughter alleging that our daughter committed suicide due to our mistreatment of her. Judy Sanders' allegations were paramount to accusations we murdered our own child.

We contacted Channel 6 and requested a retraction of their false allegations. They refused our request, claiming that all the allegations were confirmed by them with the Albany Police.

The Albany Police denied giving Judy Sanders the information she claimed she received from them.

In the summer of 1982, we approached Mr. Conway, an attorney of DeGraff, Foy, Conway, Holt-Harris and Mealey, to file a lawsuit against Channel 6. At that first meeting Mr. Conway told us he would

investigate as to our claim and that Mr. Iseman, a junior in his office, would be doing the preliminary work. Mr. Iseman and Mr. Christiansen, their investigator, investigated our claim.

On November 5th, 1982, Mr. Iseman filed a libel suit against the General Electric Broadcasting Company, the owners of Channel 6, and Judy Sanders in the total amount of $24,000,000.00 (82-CV-12-36, U.S.D.C. Northern District of N.Y.).

During the pretrial discovery period, numerous depositions were taken and several documents subpoenaed. None of the depositions or documents revealed any new information that Mr. Iseman and Mr. Conway were unaware of before filing the libel suit.

In the spring of 1984, Mr. Iseman

called us suggesting a settlement. We refused any settlement and insisted on a trial.

In September, 1985, being on call for trial, Mr. Iseman called us and asked us to come to his office on September 12th. At that meeting, Mr. Iseman pressed us and bargained with us for a settlement. He offered us "a couple of thousand he can get for us" and the defendants would pay their fees. Then he offered five, then ten, then fifteen thousand "he can get for us." Later, Mr. Conway joined us in Mr. Iseman's office and pressed us for a settlement. He advised us that the defendants had offered $25,000.00. We told them that we were not interested in a settlement and insisted on a trial.

At that meeting, on September 12th, 1985, Mr. Iseman also instructed us not to mention Levitin's name at the trial. We told him that we would not mention Levitin in court, but since Levitin had been the main source of information for Judy Sanders' report, Mr. Sabo, the defendants' attorney would probably bring up Levitin at the trial and then we would have to answer with the truth. Mr. Iseman assured us that Mr. Sabo would not mention Levitin at the trial.

The fact that Mr. Iseman and Mr. Conway were using extreme pressure on us to settle, Mr. Iseman bargaining with us from a couple of thousand to five, to ten, to fifteen thousand "he can get for us" while Mr. Conway was telling us that there was an offer of $25,000.00 made us

suspicious.

Moreover, Mr. Iseman was instructing us not to mention Levitin's name at the trial, who was the main source of information for Judy Sanders' TV report, and who was also suspected of having a hand in our daughter's death and Mr. Iseman's statement that the defendants would not bring up the issue of Levitin in court made us not only suspicious but convinced us that there was definitely something wrong going on in our case.

On September 13, 1985, the next day after our meeting in Mr. Iseman's office, where we again refused any settlement, Mr. Conway and Mr. Iseman had a conference. In order to prejudice the court against us, and prevent, a trial, Mr. Conway called, without any notice to

us, Judge Gagliardi, with intended, premeditated and malicious accusations.

Paragraph 11 of Mr. Conway's affidavit of October 30th, 1987 reads:

> "We also explained that it would be both improper and imprudent for the plaintiffs to use the witness stand as a platform for making irrelevant and reckless allegations against various public officials, charging that such officials were trying to cover up the circumstances surrounding Elena's death."

Paragraph 13 reads:

> "After our meeting and after the plaintiffs declined to promise that they would only answer the questions asked of them on the witness stand, I telephoned Judge Gagliardi and told him of our concern that the plaintiffs intended to give speeches on irrelevant matters when they took the witness

> stand. I further advised Judge Gagliardi that, unless the plaintiffs agree to conduct themselves properly, we would be forced to seek leave of the court to withdraw as plaintiffs' counsel. Judge Gagliardi advised me that our office should appear on September 16, and that the issue would be addressed at that time."

At no time did we ever ask Mr. Conway or Mr. Iseman to misuse the legal process or investigate the murder of our daughter. At no time at that meeting or at any other time was there any mention by us or by Mr. Iseman or Mr. Conway of any alleged intention to use the witness stand to make accusations against the Albany Police or other officials about a conspiracy to cover up the murder of our daughter. Nor did we ever "decline to promise" not to use the witness stand for

such an accusation. There was never any mention by us, Mr. Conway, or Mr. Iseman to that effect at any time. Besides, the coverup issue was already public knowledge. Two TV stations and local newspapers reported it already on Mr. Conway's advice and that of other lawyers we consulted.

Rule 1.16 (a) of the Rules of Professional Conduct reads:

> "Except as stated in paragraph (c) a Lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of client if: (1) the representation will result in violation of the rules of professional conduct or other laws: (b) (1) the client persists in a course of action involving the Lawyer's services that the Lawyer reasonably believes is criminal or fraudulent; (3) a client insists upon pursuing an

objective that the Lawyer considers repugnant or imprudent."

"MANDATORY WITHDRAWAL
(1) A Lawyer ordinarily must decline or withdraw from representation if client demands that the Lawyer engages in conduct that is illegal or violates the Rules of Professional Conduct or other law."

Therefore, Mr. Conway's statements in paragraph 11 and 13 in his affidavit of October 30th, 1987 are not true or else he acted against the A.B.A. Rules of Professional Conduct.

In this respect we would like to call the Court's attention to the ruling in the case Miller v. Hulsey, D.C. Ark. 1972, 347 F. Supp. 192:

"Person who mount witness stand in federal court and testifies, exercises a privilege under this amendment, for which we cannot constitutionally be punished by State or any

agency or subdivision of State."

In the case People v. Lubie, 172, 334 N.Y.S. 2d 497, 70, 70 Misc 2d 73, the Court ruled:

"This amendment protects not only right of an individual to publish, expose and disclose, but also the right of public to see and to know."

In the case Field v. Turner, 1955, 1 Misc. 2d 679, 147 N.Y.S. 2d 542 the Court ruled:

"Former Penal Law #273 (now this section) providing for trouble damages to party injured by an attorney's intentional deception of court is not limited to a client damaged but this attorney's deceit."

On September 16, 1985, we appeared in court for trial. Mr. Iseman went into the Judge's chambers. After a while, we were called into the Judge's Chambers.

Judge Cagliardi told us that our attorney, Mr. Iseman, was telling him that we had a generous offer from the defendants but we didn't want to take it. We explained to Judge Gagliardi that people do not have a child to be murdered and then to be slandered and accused of being the murderers of their own child. We told him we wanted to go to trial so that the truth about Channel 6's allegations would come out in court and we would be properly vindicated of their grave allegations by Court and Jury.

At the conference in Judge Gagliardi's chambers, it became evident to us that our attorneys had betrayed us and that they were acting against our interests and against our will and were prejudicing the Court against us.

We immediately asked Judge Gagliardi to postpone our trial in order for us to replace our attorneys. Judge Gagliardi told us that he could not postpone the trial because he came to Albany only to help out and only for a short time. We then selected the jury.

On the next day, September 17th, 1985, upon appearing in court for the trial, Judge Gagliardi called us into his chambers again. The Judge told us again that our attorney, Mr. Iseman, was telling him that we had a generous offer and advised us to take it. We again explained to the Judge why we were refusing any offer, and wanted to go to trial. Judge Gagliardi then said, "you don't know what the court may decide." We understood that if we wouldn't settle, he

would throw out the case. The court will please note that Mr. Iseman constantly threatened us that the Judge might throw out our case at any time, as is evident from our letter to Mr. Conway. (3a)

Seeing that our attorneys had betrayed us and that they were acting against our will and our interests that Judge Gagliardi called us twice into his chambers pressing us for a settlement and his refusal to postpone our trial, so that we could find another attorney to represent us, we did not see any other alternative but to take the settlement forced upon us or to let Judge Gagliardi throw out our case. In such an instance, we would have remained, in the eyes of the public, the guilty ones in our daughter's death. Mr. Iseman or Mr. Con-

way ever advised us of our rights or our alternatives. They constantly threatened us with imminent dismissal of our case by the court.

In order to have our objections to the coerced settlement on the court's records, we asked Judge Gagliardi to call in the stenographer. The transcript of the Proceedings in Judge's Chambers, submitted to the Court of Appeals as Appendix C, page 3, reads:

> THE COURT: Mr. Broad indicated that he wanted to put something on the record here.
> MR. BROAD: Yes, I would, Your Honor. Since you brought up again that question today, before I am going to trial, I am...we are accepting the offer with certain provisions.
> THE COURT: We ought to have the attorney here.
> MR. ISEMAN: May I discuss this with them? This is taking me by surprise. I would like to talk to them about it before.

would like to talk to them about it before.
THE COURT: Would you like to talk to Mr. Iseman?
MR. BROAD: Nothing to talk about any more.
THE COURT: All right. You want to say something here? Should we have...we should have the other attorney present. Wait a minute. You know, this is a little...
MR. ISEMAN: I don't know what he's going to say, and I don't think I want Mr. Sabo here until I hear what he is going to say. Mr. Broad, I would ask you, please, to speak to me about it before.
MR. BROAD: I want to make a statement. You will hear it, and if you have something to clarify, please do that. We did not hire as our attorney Mr. Iseman. We hired Mr. Conway. Mr. Conway told me that Mr. Iseman will do only the preparatory work. Since Mr. Conway is not representing us in court and other developments in our case and since you, Your Honor, cannot grant us a postponement of the trial, we are forced to

accept the defendant's offer. We feel, however, Your Honor, that Mr. Conway absence in the court and the conduct of our attorneys is a betrayal of our confidence. Moreover, we feel that it is a part of the conspiracy to cover up the murder of our daughter.

Page 7 reads:

THE COURT: He's perfectly ...he's indicated he's perfectly satisfied to try this case.
MR. BROAD: I know. We had a discussion of that, but our confidence is shattered, particularly in the last week or so with the suggestions from the attorneys. I completely lost confidence, and, as I mentioned before, I ask you, Your Honor, to postpone it so that I can find a different lawyer to defend -- represent us. Since you cannot do that, then I think that concludes it and we accepted the offer and that is it.

The Court will please note that the

transcript of Proceedings in Judge's Chambers is only the final part of proceedings in Chambers, that is, after we asked Judge Gagliardi to call in the stenographer.

We were ordered then into the courtroom, to finalize the "settlement." Judge Gagliardi put some questions to us. As to "voluntary settlement," we had to answer affirmatively to his questions because we were afraid that if we said that the settlement was not voluntary but forced upon us, the Judge, here and now, would have thrown out our case. Having lost our trust in our attorneys, we had also to negotiate ourselves some aspects of the retraction of Channel 6's allegations. The Court will please note that our "negotiations" with Channel 6 were

only in regard to their false allegations and that all of their allegations had to be retracted. We had never had any prior court experience nor did we have any knowledge about court proceedings. Neither Mr. Iseman nor Mr. Conway ever advised us of our rights or our alternatives nor the court procedures at the trial.

Judge Gagliardi, being prejudiced against us by our attorney's false accusations, his refusal of our request for a postponement of the trial in order to replace our attorneys, whom we were openly accusing before him of being a party to the conspiracy to cover up a murder, and the procedure in the Chambers and the Courtroom, all were an abuse of discretion by Judge Gagliardi.

The next day after the forced, coerced settlement, we called TV Channel 13 in Albany to publicly denounce the coercion, which they broadcast on September 25, 1985 in their regular 6:00 P.M. news report. It reads in part:

> REPORTER:
> "A recent settlement in a multi-million dollar libel suit against WRGB-TV and reporter Judy Sanders has not settled well with the mother and stepfather of Elena Zhilinskaya. They filed a suit because WRGB reported that their mistreatment of her contributed to her 1981 suicide, but it actually turned out to be a homicide. They are no longer upset at WRGB but rather, at their own attorneys, who told them to settle, they say, against their will."
> MR. BROAD: "Because of the pressure of our attorneys, Mr. Iseman and Mr. Conway."

PROCEEDINGS AGAINST OUR ATTORNEYS:

On October 1st, 1987, we filed a lawsuit against Mr. Conway, Mr. Iseman

and the DeGraff, Foy, Conway, Holt-Harris and Mealy firm, for malpractice at the United States District Court, Northern District of New York, Case Number 87-CV-1331. (4a)

On December 23rd, 1987, Judge McCurn granted the defendants' motion of summary judgement.(675 F.Supp.768(N.D.N.Y.1987)

On January 21st, 1988, we filed an appeal from Judge McCurn's summary judgement order with the United States Court of Appeals for the Second Circuit, Case number 88-7076.(5a)

SUMMARY JUDGEMENT:

The Court recognized two components of the Summary Judgement:

1. The right by plaintiffs to sue.

The Court recognized that the plaintiffs have a right to sue, and

2. The issue of coercion.

WE STOOD A REASONABLE CHANCE OF SUCCEEDING ON THE MERIT OF THE LIBEL ACTION. The Court MISAPPLIED the Owens v. Lombardi ruling to our case. IT WAS NOT A MALPRACTICE ACTION. IT WAS TO VACATE A SETTLEMENT nor were Salahuddin v. Coughlin (a criminal case) or Hamlin v. Mitchelson (related to arbitration and fraud) applicable to our case. Nor was the Gaeta ruling applicable to our case. There are also other errors and inaccuracies in the Summary Judgement. Our Brief and response to Appellees' Brief, filed with the Court of Appeals, deals more fully with these issues.

On May 19th, 1988, the Court of Appeals upheld Judge McCurn's summary judgement (there was no opinion nor

discussion for the order by the Court of Appeals).(1a)

In the Case Hull v. Brandywine Fibre Products Co. D.C.Del. 1954, 121, F.Supp. 108, the Court ruled:

> "A Summary judgement should not be granted if any controverted question of fact appears which would or could be presented to jury at subsequent trial."

Even the defendants in their reply to Memorandum of Law admit that there are many areas of disagreement.

> "Summary Judgement does not serve as a substitute for trial." Redhouse v. Quality Food Sales, Inc. C.A. Utah 1975, 511, F. 2d 230, rehearing 523 F. 2d 1

As to the issue of coercion, we would like to call the Court's attention particularly to the ruling by the United States Court of Appeals for the Second

Circuit in the Case Kothe v. Smith on appeal 771F 2d 667 (1985) for imposing sanctions by District Court Judge for not heeding the Judge's advice to settle:

> [1.2] Although the law favors the voluntary settlement of civil suits, ABKCO Music, Inc. v. Harrisongs Music, Ltd, 722 F. 2d 988, 997 (2d Cir. 1983), it does not sanction efforts by trial judges to effect settlement through coercion. Del Rio v. Northern Blower Co., 574 F 2d 23,26 (1st Cir. 1978 and other cases cited). Citing Wolf v. Laverne, Inc. 17 A.D. 2nd 213,233 N.Y.S. 2d 555 (1962) the court ruled:"We view with disfavor all" pressure tactics whether directly or obliquely to coerce settlement by litigants and their counsel. Failure to concur in what the justice presiding may consider an adequate settlement should not result in the imposition upon an litigant or his counsel, who reject it, of any retributive sanctions not specifically

> authorized by law." A.D. 2d at 215,233 N.Y.S. 2d 555: "In short, pressure tactics to coerce settlement simply are not permissible" (and other cases cited.)
> [3.4] "Rule 16 of Fed R. Civ.P. was not designed as a means for clubbing the parties -- or one of them -- into involuntary compromise."
>
> Although subsection (c) (7) of Rule 16 added in the 1983 amendments to the Rule, was designed to encourage pretrial settlement discussion, it was not its purpose to "impose settlement negotiations on unwilling litigants." See Advisory Committee Note, 1983, 97 F.R.D. 205,210.

The Court further states:

> "Although we commend Judge Sweet for his efforts to encourage settlement negotiations, his excessive zeal leaves us no other resource but to remand the matter with instructions to vacate the judgement."

As to the issue of malpractice, we

would like to call the Court's attention to the decision of the United States Court of Appeals for the Second Circuit in the action Skinner v. Stone Docket No. 83-7358, the Court ruled:

> "Although an attorney may not be liable for errors of judgement, he must exercise ordinary skill and diligence in his representation of clients in the course of litigation."

Further, the Court ruled:

> "Whether appellees did exercise such skill and diligence would be, in the first instance, a question for the jury...Under New York Law, where there are several proximate or efficient causes of an injury, injury may be attributed to any one or more causes...A jury with all the facts before it also might find that appellee contributed to the fiasco by failing to take steps to head off the entry."

In the case Preveden v. Hahn, 36F. Supp. 952, the court ruled:

> "An attorney has no right to settle his client's case nor to consent of it upon merit, without express authority from client and such authority is not implied in a mere retainer."

In the case Fiske v. Buder, C.C.A. Mo 125 F. 2d 841, the Court ruled:

> "The relation of an attorney and client inspires confidence in client, and mere breach of fidelity to client's interest is `constructive fraud' and gives client a right to redress."

In the case Jacobson v. Overseas Tanks Corp. D.C.N.Y. 11, F.R.D. 97, the Court ruled:

> "An attorney has no implied authority to compromise a client."

In the case Werrick v. C.I.R. 173 F 2d 905 the Court ruled:

> "Attorney must not only not do anything against best interests of his client, but by reason of trust and confidence relation existing between them must do everything consistent with proper professional conduct within his power, in his client's interest."

In the case Titsworth v. Mondo 407, N.Y.S. 2d 793, the Court ruled:

> ..."damages in a legal malpractice action are measured by value of claim lost."

The Court further ruled:

> ..."execution of the release and retention of settlement proceeds constituted ratification of the settlement as to the third party but did not in and of itself preclude a malpractice claim."

As to the issue of summary judgement, we would like to call the Court's attention to the case, Jeroslovicz v. Sedman

C.A.N.Y. 195 528 F 2d 727. The court ruled:

> "Responsibility of district judge on a motion for summary judgement is merely to determine that there are issues to be tried, rather than to try the issues himself via affidavit."

In the Arkwright Mut. Ins. Co. v. Philadelphia Electric Col, C.A.Pa. 1970, 427 F 2d 1273, the Court ruled:

> "Where questions of negligence and causation exist, both this amendment and Common Law require that only the jury resolve them."

In the case Oglesley v. Terminal Transport Co. Inc. C.A. Ga. 1976, 543 F 2d 1111, the Court ruled:

> "Entry of summary judgement against plaintiff on his failure to properly respond to motion for summary judgement did not deprive him of right to jury trial under this amendment or his

> right not to be deprived of property without due process of law."

The Supreme Court, in the libel case Time, Inc. v. Firestone 424 U.S. 448,47 L.Ed 154 (No.74-944) ruled:

> "The `actual malice' test in a `public figure' defamation action requires that the plaintiff prove that the defamatory statement was made with knowledge that it was false or with reckless disregard of whether it was false or not...Injury to one's reputation is not the sole type of compensable injury in a defamation action."

In Butts v. Curtis Publishing Company CIV. A. No 831 U.S. District Court N.D. Ga. Atlanta Division, ruled:

> "Fixing the amount of damages is primarily in the province of the jury and the court, if possible, should try to avoid invading that field."

In Foulk v. Awere, Inc. 35 Misc. 2d

302. 315,317, the Court ruled:

> "Damages recover for libel consists compensatory damages and punitive or exemplary damages which may be awarded in a jury's discretion provided jury finds malice on part of defendant or such reckless and wanton indifference to the rights of others as is the equivalent to malice."

The Court further ruled:

> "Punitive damages are authorized in a libel suit as penalty to punish a defendant to deter him from a repetition of the offense and to warn others of like mind from perpetrating similar wrongs."

In the case Lynch v. New York Times Co. 171 A.D. 399, 401, 157 N.Y.S. 392, 393, the Court ruled:

> "True, fixing the amount of damages is primarily in the province of the jury, and it has been said, with respect to libel cases, `the jury is generally

> considered to be supreme arbiter on question of damages.'"

In the action Douglas v. Hustler Magazine, Inc. 607 F. Supp. 816 (D.C. Ill 1984) for invasion of privacy by a photographer, the Court ruled:

> "In determining whether an award of compensatory damages is excessive, the decision of the jury as the fact finder is given substantial deference, especially in cases involving intangible injuries, and unless the court is convinced that an award is grossly excessive, inordinate, monstrous or shocking to the conscience, it will not be disturbed."

The Court further ruled:

> "The jury is the collective conscience of the community, and its assessment of damages must be given particular weight when intangible injuries are involved."

and:

> "The jury is generally considered to be supreme arbiter on question of damages."

As to Judy Sanders' gross irresponsibility, I would like to call the Court's attention to the ruling of the U.S. D. C. for the District of VT in the case, Stone v. Banner Publishing Co. No. 87 CIV 84, 87 CIV 85:

> "The article is not safe by the attribution of almost all statements to the police...even though the article accurately reflected the police report, the Banner would be liable for printing any defamatory statements given by the police."

When a lawyer files a lawsuit on behalf of a client, the client does not abdicate his case to the lawyer, nor does the client abdicate to the lawyer the control of the lawsuit. The lawyer is

only a counsel to his client and an executor of the client's legitimate wishes and claims. If an attorney feels that the client does not follow his counsel, or if the client demands of the attorney acts that are unlawful or contrary to his advice, or against the rules of professional conduct he should resign as counsel to his client as laid down in the A.B.A. Rules of Professional Conduct.

The Court will please note that Mr. Conway and Mr. Iseman <u>not only coerced us into the settlement with Channel 6 but coerced us also to accept the money from the coerced settlement, which we refused for almost a year to take.</u> (6a)

The Court will please also note that

Mr. Iseman had been subpoenaed for deposition and for producing documents in the related case Broad v. Becher (Case No. 87-CV-1330 pending before U.S. District Court, Northern District of New York) for failure to file a wrongful death action and malpractice and that he refused to testify or to produce the documents.

Finally, we would like to call the court's attention to Judge McCurn's contention in his Order for Summary Judgement, page 18 (7a) that there is no mention in the Transcript that we requested a postponement of the trial in order to replace our attorneys. This contention is ABSOLUTELY ERRONEOUS as evident from the Transcript and quotation above on pages 22 and 23.

REASON FOR GRANTING THE WRIT

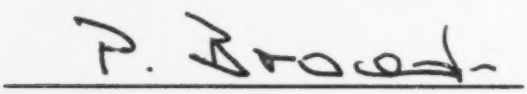
The Petition should be granted for:

1. Service to justice
2. For due process of law
3. To rectify the wrong done to us by our attorneys, and
4. To deter unethical and unlawful practices by some lawyers.

CONCLUSION

The petition for WRIT OF CERTIORARI should be granted and upon review, the decision of the Court of Appeals and the order of the District Court for Summary Judgement reversed.

Respectfully submitted,



Paul Broad, for Petitioners
18 Chase Avenue
North Adams, MA 01247
Tel: (413) 663-8611

Dated: August 18, 1988

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Nineteenth day of May, one thousand nine hundred and eighty-eight.

Present: HONORABLE J. EDWARD LUMBARD

HONORABLE THOMAS J. MESKILL

HONORABLE RALPH K. WINTER

Circuit Judges

PAUL and ANNA BROAD

Plaintiffs-Appellants,

v.

WILLIAM F. CONWAY, ROBERT H. ISEMAN AND DeGRAFF, FOY, CONWAY, HOLT-HARRIS & MEALEY,

Defendants - Appellees.

Docket No. 88-7076

This is an appeal, pro se, from a judgment entered in the United States District Court for the Northern District of New York, McCurn, J., granting defendants-appellees' motion for summary judgement pursuant to Fed. R. Civ. P.56. Plaintiffs-appellants claim that the district court erred in dismissing their claims that their former attorneys had committed legal malpractice and breached a contractual agreement.

This cause came on to be heard on the transcript of record from said district court and was argued by appellant pro se and by counsel for the appellees.

The judgement of the district court is AFFIRMED substantially for the reasons stated by Judge McCurn in his opinion below dated December 23, 1987.

J. Edward Lumbard, U.S.C.J.

Thomas J. Meskill, U.S.C.J.

Ralph K. Winter, U.S.C.J.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

C-2 TIMES UNION ALBANY, N.Y. Sunday,

April 18, 1982

DEAD MARINE'S MOM WANTS ACTION

GUILDERLAND - The family of a young Marine who died after a fight last Thanksgiving formally launched their petition drive Saturday to urge authorities to speed up the homocide investigation of the case.

Nearly 30 friends and supporters canvassed the parking lot of the Twenty Mall here Saturday with Sandra Pinchook, mother of 19-year-old Michael Pinchook, the victim. She said the group already has 8,000 of the 10,000 signatures they are seeking.

Also attending the rally was Paul and Anna Broad, the mother and stepfather of Elena Zhilinskaya, a 22-year-old Russian

immigrant found strangled in her Albany apartment Nov. 15. He said he is upset authorities have not yet solved the murder.

Pinchook's petitions are to be sent to Albany County District Attorney Sol Greenberg, who has blamed the delay on the need to gather evidence. Investigators have argued they are limited in how they can interrogate witnesses.

"We will operate within the law, rather than by a lot of hysteria created by the papers," Greenberg has said. He could not be reached for comment Saturday.

"All I can do is hope," Pinchook said, "I try to have faith in the district attorney and the justice system. You wonder. Greenberg said he wouldn't try

the case in the media, but why isn't he trying it in the courts?"

"Who am I supposed to believe? I'm still without a son, and they're still playing around in Albany."

Pinchook died while on leave for the Thanksgiving Day holiday. Police say he was involved in a fight outside a sandwish shop on Western Avenue at about 3:30 a.m. November 26.

Police also say they have identified five possible witnesses in the case. The five have retained attorneys, who have told their clients not to discuss the case with authorities.

"It's terrible the way things are going on this," said Karen Vink, of Colonie,

one of those who signed the petition Saturday. "They're trying to hush things up. Certainly something should be done by now."

Paul Broad

111 West Avenue

Great Barrington, MA 01230

Tel: (413) 528-2666

July 29th 1984

Mr. William F. Conway

Degraff, Foy, Conway, Holt-Harris & Mealey

90 State Street

Albany, N.Y. 12207

Dear Mr. Conway:

For some time now, I am trying to get in touch with you regarding our case against G.E.Broadcasting Co.

As you are aware of, I am sure, the defendent's motion for Summary Judgement is coming before the court shortly and we feel we should have a meeting before the

hearing to discuss the matter at any time to your earliest convenience.

Looking forward to hear from you soon, I remain,

Sincerely yours,

Paul Broad

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

Paul & Anna Broad

Plaintiffs

VS.

William F. Conway
Robert H. Iseman
DeGraff, Foy, Conway, Holt-Harris
and Mealey

Defendents

COMPLAINT

In the summer of 1982, we engaged Attorney William F. Conway of DeGraff, Foy, Conway, Holt-Harris & Mealy to file a suit against General Electric Broad-

casting Co. of Schenectady, N.Y. and Judy Sanders their TV reporter.

At the time of the engagement, Mr. Conway told us that the preliminary work will be done by a junior in his office, Mr. Robert H. Iseman.

A libel suit was filed with the US District Court in Albany by the attorneys for $24,000,000.00.

During the pretrial hearings and preparation for the trial, we were not impressed by Mr. Iseman's handling of our case but were patiently waiting for Mr. Conway to take over the case as he promised at the time of the engagement.

July 29th, 1984, I wrote Mr. Conway expressing our concern about our case and asked him for an appointment to discuss the matter.

September 14th. 1984, I wrote again

to Mr. Conway expressing again our concern about our case and reminded him of our arrangement. Mr. Conway did not reply to my letters nor did he answer our numerous telephone calls.

September 16th, 1985, the day before the trial, we met with Mr. Iseman and Mr. Conway. They were pressing us and bargained with us to settle out of court. Mr. Iseman told us first that he can get for us a couple of thousand. Then five thousand. Then ten thousand. Then fifteen thousand. Finally, Mr. Conway offered $25,000.00. We told them that we want to go to trial so that the truth can come out and for the court to decide.

September 17th. 1985, we selected the Jury. Before selecting the Jury, Mr. Iseman went to the Judge in his

chambers and prejudiced the Judge against us. Judge Gagliardi called us in and told us that Mr. Iseman, our attorney, is telling him that we have a generous offer from the defendents but we do not want to take it. We explained to the Judge why we refuse the offer and why we want to go to trial. Seeing that Mr. Iseman is prejudicing the Judge against us and that something very wrong is going on in the handling of our case by our attorneys, I asked Judge Gagliardi for postponement of the trial. The Judge told me that he came to Albany for a short time to help out only and that he cannot postpone the trial. The Jury was selected.

Next morning, September 18th, 1985, the day of the trial, Mr. Conway did not show up to represent us in court.

Mr. Iseman went again into Judge's chambers. Judge Gagliardi called us in again and told us that Mr. Iseman is telling him that $25,000.00 and a public apology by the TV station is a very generous offer and that we should take it. We were afraid that the Judge being prejudiced against us by our attorney may dismiss our case in a Summary Judgement, and having lost our trust in our attorneys, we were forced to accept the defendents' offer. Accepting the offer, we made the following statement which is on file with the court:

> " We did not hire as our attorney Mr. Iseman. We hired Mr. Conway. Mr. Conway told us that Mr. Iseman will do only the preparatory work. Since Mr. Conway is not here in court

to represent us and other developments in our case, and since you, Your Honor, cannot grant us a postponement of the trial, we are forced to accept the defendents' offer.

We feel, however, Your Honor, that Mr. Conway's absence in court and the conduct of our attorneys is a betrayal of our confidence. Moreover, we feel that it is a part of the conspiracy to cover up the murder of our daughter."

Because Mr. Conway failed to represent us as we agreed to, Mr. Conway's and Mr. Iseman's reckless handling of our case, and because they willingly and knowingly deprived us of court justice and of collecting from General

Electric Broadcasting Co. and Judy Sanders the amount of $24,000,000.00 or any amount the court would have decided, we are demanding compensatory and punitive damages.

There is no price high enough, monetary or otherwise, to pay parents for a murdered child. The $24,000,000.00 has not been set by us but by Mr. Conway and Mr. Iseman. Therefore, we demand compensatory damages of $23,975,000.00 and punitive damages of $23,975,000.00 with all the costs and disbursements of this action.

We demand a Trial by Jury.

Plaintiff's Signature

18 Chase Ave.,North Adams, Ma 01247

(413) 663-8611

Plaintiff's Phone Number

UNITED STATED DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

PAUL and ANNA BROAD

Plaintiffs,

-against-

Case No.
87-CV-1331
(McCURN)

WILLIAM F. CONWAY, ROBERT H. ISEMAN, AND DeGRAFF, FOY, CONWAY, HOLT-HARRIS & MEALEY,

Defendents

NOTICE OF APPEAL

Notice is hereby given that PAUL and ANNA BROAD, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the Order of Summary Judgement, entered in this action on the 23 day of December, 1987.

January 20th. 1988

Paul Broad, for
plaintiffs
18 Chase Avenue
North Adams,MA 01247
Tel:(413) 663-8611

DEGRAFF, FOY, CONWAY, HOLT-HARRIS & MEALEY, Attorneys and Counselors at Law, Ninety State Street, Albany, New York 12207-1780

Telephone: (518) 462-5301

May 6, 1986

Mr. and Mrs. Paul Broad
111 West Avenue
Great Barrington, MA 02130

Dear Mr. and Mrs. Broad:

Not having heard from you in response to my letter of January 7, 1986, I write to advise you of my intention to apply to the court to fix our attorneys' fees in this matter and to authorize direct payment from the insurance carrier for WRGB (General Electric Broadcasting). I should further tell you, in fairness, that your failure to endorse the settle-

ment check and to comply with our retainer agreement constitutes, in my judgement, a repudiation of that agreement by you and, accordingly, it will be my intention to ask the court to fix our legal fee based upon the fair and reasonable value of our services, which I believe will be significantly more than one-third of the recovery. In deference to you, I will not make my application to the court until June 1, 1986, in hopes that you will contact me to make arrangements for endorsing the settlement draft.

Very truly yours,

DeGRAFF, FOY, CONWAY, HOLT-HARRIS&MEALEY

(signed)
Robert H. Iseman

RHI/mel

Anna and Paul Broad

P.O. Box 416

Great Barrington, MA 01230

August 6th,1986

Mr. William M. Conway

DeGraff, Foy, Conway, Holt-Harris & Mealey

90 State Street

Albany, NY 12207

Dear Mr. Conway,

This is to inform you that our endorsement of the check from the Electric Mutual Liability Insurance Company and the receiving from your company $18,491.95 should in no way be construed that we approved of the settlement with General Electric Broadcasting Co. and/or that we approved of your handling of our case against General Electric Broadcasting Company.

Sincerely yours,

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

PAUL AND ANNA BROAD,

Plaintiffs,

-v-

WILLIAM F. CONWAY, ROBERT H. ISEMAN, and DeGRAFF, FOY, CONWAY, HOLT-HARRIS & MEALEY,

Defendants.

APPEARANCES: OF COUNSEL

PAUL AND ANNA BROAD
Plaintiffs, Pro Se
18 Chase Avenue
North Adams, MA 01247

ROCHE, CORRIGAN, ESQ. McCOY & BUSH
Attorneys for Defendants
36 South Pearl Street
Albany, New York 12207

ROBERT P. ROCHE,

NEAL P. McCURN, D.J.

MEMORANDUM-DECISION AND ORDER

Plaintiffs, Paul and Anna Broad, commenced this action against the law firm of DeGraff, Foy, Conway, Holt-Harris

& Mealey ("the DeGraff firm") and two partners in that firm, William Conway and Robert Iseman, basically alleging legal malpractice by those defendants. Presently before the court is defendants' motion for summary judgement pursuant to Fed. R. Civ. 56. For the reasons discussed herein, defendants' motion is granted.

BACKGROUND

In June of 1982, plaintiffs contacted William Conway, a partner in the DeGraff firm, regarding the possibility of commencing a lawsuit against a television station and several of its reporters for a news broadcast, which plaintiffs claimed was libelous. In particular, plaintiffs believed that the

news broadcast was libelous because it implied that their treatment of Elena Zhilinskaya, Mrs. Broad's daughter and Mr. Broad's stepdaughter, may have contributed to her death which was initially thought to be a suicide. (Apparently, investigation into Ms. Zhilinskaya's death now remains an open homicide case with the Albany police.

According to Mr. Conway, after being contacted by plaintiffs, he met with them and informed them that his firm would make a "preliminary assessment" as to the merits of their case. Conway Affidavit (10/30/87) at paragraph 3. He then asked Mr. Iseman, another partner with the DeGraff firm, to determine whether plaintiffs had a meritorious case, and if they did, Mr. Iseman was to handle the case. Conway Affidavit at paragraph 4

and Iseman Affidavit (10/30/87) at paragraph 8. After determining that plaintiffs' did have a meritorious claim, Mr. Iseman proceeded to handle their case. During that time, he kept Mr. Conway apprised of the progress of plaintiff's case, and that conduct was consistent with Mr. Conway's statement to plaintiffs that he would keep abreast of their case and confer with the assigned attorney, as was the office policy. Conway Affidavit at paragraph 7.

Throughout Mr. Iseman's handling of the case, Mr. Conway claims that he never received any complaints from plaintiffs regarding Mr. Iseman's handling of their case. Conway Affidavit at paragraph 6. Nor did plaintiffs ever express any dissatisfaction to Mr. Iseman regarding his handling of the case, until it was

called for trial. Iseman Reply Affidavit (12/1/87) at paragraph 4. Plaintiffs claim in their complaint, however, that they were "not impressed with Mr. Iseman's handling of our case but were patiently waiting for Mr. Conway to take over the case as he promised at the time of the engagement." Complaint at paragraph 4.

When the case was finally called for trial, the plaintiffs informed Judge Gagliardi in chambers that they had lost trust and confidence in Mr. Iseman and that they believed Mr. Iseman had become part of the "conspiracy" against them to cover up the cause of Ms. Zhilinskaya's death. TR. 2 at p.2 * Despite that alleged loss of trust and confidence in their attorney, plaintiffs did not discharge Mr. Iseman nor the DeGraff

firm.

---

* In support of their summary judgement motion defendants submitted two transcripts from the proceedings before the Honorable Lee P. Gagliardi, United States District Court Judge. The first was a transcript in the case of Broad v. General Electric Broadcasting Company, Inc. et al, 82-CV-1236. That transcript sets forth the settlement stipulation entered into by the parties to that action in open court on September 17, 1985, and it was attached as Exhibit "E" to Mr. Iseman's affidavit submitted in support of defendants' motion. That transcript will be referred to herein as "TR.1."

The second transcript is also from the above referenced case, and it sets forth the proceedings which took place in chambers on September 17, 1985. Judge Gagliardi, plaintiffs' counsel, Mr. Iseman, and plaintiffs were present at that time. The transcript of that matter is attached as Exhibit "A" to Mr. Iseman's Reply Affidavit (12/1/87) and will be referred to herein as "TR.2."

Plaintiffs did express their concern to Judge Gagliardi at that conference in chambers, however. Specifically, Mr. Broad stated:

> We did not hire as our attorney Mr. Iseman. We hired Mr. Conway. Mr. Conway told me that Mr. Iseman will do only the preparatory work. Since Mr. Conway is not representing us in the Court and other developments in our case, and since you, your Honor, cannot grant us a postponement of the trial, we are forced to accept the defendant's (sic) offer. We feel, however, your Honor, that Mr. Conway's absence in the Court and the conduct of our attorneys is a betrayal of our confidence. Moreover, we feel that it is a part of the conspiracy to cover up the murder of our daughter.

TR.2 at p. 2. Nevertheless, plaintiffs went ahead with a settlement in which Mr. Broad had significant input. See TR. 1. Eventually, plaintiffs' lawsuit was settled for $25,000.00 and a public apology by the television station; a settlement that Mr. Conway described as "even more favorable" than he thought possible when he had conferred with plaintiffs prior to trial.

Conway affidavit at paragraph 14.

The settlement was put on the record. Before that was done, however, Judge Gagliardi instructed plaintiffs to listen "attentively" to the settlement, because after it was on the record, he was going to ask plaintiffs whether it was their "own voluntary desire" to settle the matter. TR 1. at p. 102. When the Judge asked plaintiffs if they understood that instruction, Mr. Broad responded, "Yes, your Honor." Id. at p.2. After defense counsel put the settlement on the record, Judge Gagliardi asked the plaintiffs whether they were satisfied with the settlement and they said that they were. TR 1 at p.8. Then the Judge specifically asked plaintiffs whether they were coerced into settling their action, and plaintiffs stated that

they were not. Id. Approximately three weeks after plaintiffs agreed to that settlement in open court, they executed a general release and returned it to the DeGraff firm. Iseman Affidavid Ex. "G." Subsequently, plaintiffs receoved $18,491.95 as their net recovery.

Plaintiffs then commenced the present action alleging that the defendants "forced" them into accepting the settlement offer. Complaint at paragraph 9.* Plaintiffs further alleged that Mr. Conway failed to represent them "as [they] agreed to," and that Mr. Conway and Mr. Iseman recklessly handled their case. Id. at paragraph 10

* Although plaintiffs did not number the paragraphs of their complaint, the court has taken the liberty of doing so for the sake of convenience.

Defendants are now moving for summary judgement arguing first that such relief is proper because plaintiffs voluntarily and unconditionally settled their libel action on the record, in open court, and thus, plaintiffs are estopped from asserting now that they were coerced into settling. Second, defendants argue that even assuming plaintiffs were coerced into settling, plaintiffs cannot establish the necessary elements of a legal malpractice action.

DISCUSSION

Pro se complaints are to be liberally construed. Hughes v. Rowe, 449 U.S. 5,9 (1980) (per curiam); Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam); Robles v. Coughlin, 725 F.2d 12,15 (2d Cir. 1983). A liberal construction of the complaint in this case

indicates that plaintiffs are apparently alleging a cause of action based upon legal malpractice against these defendants. There are two aspects to that malpractice claim. The first is that defendants allegedly "forced" plaintiffs into settling the underlying action. The second seems to be based upon some sort of malfeasance or misfeasance by defendants, described by the plaintiffs as the "recless" [sic] handling of their case. Finally, there is a possibility that plaintiffs have also stated a cause of action for breach of contract by alleging that they retained Mr. Conway, but that he did not handle their case, as plaintiffs allege was the agreement between them.

I. The Settlement

Turning to the coercion issue, the first consideration is the effect on the present action of plaintiffs' settlement of the underlying action. Although not expressly stated by defendants, there are actually two components to their argument regarding plaintiffs' settlement of the underlying action. The first is that plaintiffs are barred from bringing this action based upon the prior settlement. It has been recognized, however, that a plaintiff's legal malpractice cause of action "must stand or fall on its own merits, and there is no automatic waiver, as a matter of law," of plaintiff's right to use. N.A. Kerson Company, Inc. v. Shayne, Dachs, Etc., 59 A.D.2d 551, _ ,397 N.Y.S. 2d 142, 144 (2nd Dep't 1977), aff'd on concurring opinion of Suozzi,J.

45 N.Y. 2d 475 (1978). Cf. Mazzei v. Pokorny, Schrenzel & Pokorny, 125 A.D.2d 374, ___, 509 N.Y.S.2d 100, 101 (2nd Dep't 1986) (General release executed by plaintiff in underlying action does not preclude him from bringing subsequent legal malpractice action.) That is true even if plaintiffs voluntarily settled the underlying action. Kerson, supra, 397 N.Y.S. 2d at 144. Therefore, contrary to defendants' assertion, the fact that plaintiffs voluntarily settled the underlying action does not preclude them from bringing the present legal malpractice action.

The second component of defendants' argument regarding the settlement is, however, meritorious. In particular, defendants contend that because plaintiffs did not raise the issue of coercion

at the time of settlement, and, in fact, indicated the exact opposite to Judge Gagliardi in open court, plaintiffs are estopped from raising that issue on this summary judgement motion.

In Owens v. Lombardi, 41 A.D. 2d 438, 343, N.Y.S. 2d 978 (4th Dep't 1973), a case relied upon by defendants, the terms of a stipulation involving a real estate matter were read into the record before the judge, in chambers. At the time of the settlement, the plaintiff husband was present, but not his wife, who was also a plaintiff. Several months later the court refused to vacate that settlement on plaintiffs' motion. The court held that the plaintiff wife was estopped from raising a claim that her attorney had exceeded the scope of his authority in settling the case on her

behalf. Id. at ___, 343 N.Y.S. 2d at 982. The court further held that the plaintiff wife was estopped from raising a claim that the settlement did not express her true intentions. Id.

Applying that rule to the present case, plaintiffs are now estopped from raising an issue as to whether they were coerced into settling the underlying action. After defense counsel stated the terms of the settlement on the record, plaintiffs were explicitly asked by Judge Gagliardi, in open court, on the record:

> THE COURT: Is that satisfactory, Mr. Broad?
>
> MR. BROAD: Yes, sir.
>
> MRS. BROAD: Yes.
>
> THE COURT: And no coercion or influence has been exerted upon you by anyone to enable you to

arrive at this disposition; is that correct?

MR. BROAD: Correct, your Honor.

THE COURT: Mrs. Broad?

MRS. BROAD: Yes.

Tr. 1 at p.8. As previously noted, although plaintiffs did express some concern regarding their attorneys to Judge Gagliardi at the conference in chambers prior to reading the settlement into the record, at no time did they request that the DeGraff firm withdraw from their case.

Furthermore, it is evident from a reading of the transcript that Judge Gagliardi, aware of plaintiff's concern, took every step to insure that plaintiffs were not settling their case because they felt compelled to from some outside source. For example, at the start of the

proceeding where the settlement was put on the record, Judge Gagliardi specifically instructed plaintiffs as follows:

> All right. Mr. and Mrs. Broad, will you listen to the proposition that Mr. Sabo, on behalf of the Defendants, is making which I wish you to listen to attentively, and after it is on the record, I'm going to ask you if you agree to it, and I'm going to ask you if this is your own voluntary desire to dispose of this matter in this manner. Do you understand?

TR.1 at p.1-2. In addition, repeatedly throughout the settlement proceeding, the Judge asked plaintiffs if certain provisions of the settlement were satisfactory to them, and they responded affirmatively. See, TR.1. Further Mr. Broad himself was actively involved in negotiating the settlement while it was being placed on the record. Id.

If these plaintiffs did not want to settle, they had ample opportunity to

discharge their attorneys and proceed to trial with other counsel. In plaintiffs' papers in opposition to this motion, plaintiffs claim that they requested of Judge Gagliardi that the trial be postponed "to replace our attorneys." The quoted language was added, however, by plaintiffs for purposes of this motion. There is absolutely no mention in the transcript, either in chambers, or in open court, that plaintiffs asked Judge Gagliardi for an adjournment to obtain new counsel. While at this point plaintiffs may wish that they had made such a request, the fact remains that they did not.

Under these circumstances, plaintiffs cannot now disavow the plain and unequivocal terms of the settlement, which they entered into voluntarily on

the record, in open court. As defendants correctly noted, allowing plaintiffs to disavow a voluntary settlement made on the record in open court would "wreak havoc" with the judicial system. Not only would defense counsel be more reluctant to settle, out of fear that those settlements would later be set aside simply because plaintiffs changed their minds, but the attorney client relationship would also be undermined. Plaintiffs' attorneys would also be more reluctant to settle, because even if their clients agreed to a voluntary settlement, plaintiffs' counsel would be concerned that plaintiffs would sue them for malpractice at a later date.

Therefore, because the plaintiffs expressly stated on the record, in open court, that they were not coerced or

influenced to settle, plaintiffs are precluded here from claiming that there is an issue of fact as to whether they voluntarily settled the underlying action. Thus, insofar as plaintiffs complaint alleges a legal malpractice claim based upon coercion, that claim must necessarily fail. But, even assuming that plaintiffs were coerced into settling, as discussed in section II, plaintiffs have nevertheless failed to establish the necessary elements of a legal malpractice action.

II. The Merits of the Legal Malpractice Action

Although pro se complaints must be liberally construed, the Second Circuit has recognized that "[A]t some point in a lawsuit even pro se litigants must make clear to the court their claims and the

facts that they believe entitle them to specific relief." Salahuddin v. Coughlin, 781 F.2d 24,29 (2d Cir.1986). The Court further stated, "The summary judgement stage is an appropriate juncture to identify the real issues in a case." Id. (citation omitted). Here, plaintiffs have failed to show facts sufficient to establish that they are entitled to relief.

It is well settled that an action for legal malpractice requires proof that negligency by the attorney proximately caused the loss sustained and proof of actual damages. Hanlin v. Mitchelson, 623 F. Supp. 452, 455 (S.D.N.Y. 1985) (and cases cited therein). Accordingly, to prevail in a legal malpractice action, a plaintiff must show that but for the alleged acts of malpractice, he would

have been able to recover or proceed in a manner other than that which actually occurred. Id. at 456 (and cases cited therein).

Here, plaintiffs have not demonstrated that the result would have been different if the case had been handled differently. First, even assuming that plaintiffs were "forced" to settle the underlying action, they have not made any allegations which would tend to show that they would have been able to recover or proceed in a manner other than that which actually occurred. In fact, as defendants accurately pointed out, plaintiffs, in their complaint, allege that Mr. Conway was "pressing" them to settle. And, the settlement figures being bandied about at that time, when Mr. Conway was involved, were substantially less than

the $25,000.00 plaintiffs ultimately received. Initially, the defendants in the underlying action were only willing to settle for a modest amount (less than $10,000). Iseman Affidavit at paragraph 28.

Further, Mr. Conway states that prior to trial he advised plaintiffs that if a settlement could be negotiated clearing their name, they should give "serious consideration to accepting it, even if it only involved the payment of nominal money damages." Conway Affidavit at paragraph 12. Finally, he avers:

> Based upon Mr. Iseman's status reports to me during the course of the litigation and my reading of his affidavit before the court, I can say unequivocally that the plaintiffs received representation of the highest quality and that I would not have proceeded differently if I had personally handled the plaintiffs' claim.

Id. at paragraph 14. Thus, it is clear that even if Mr. Conway had handled plaintiffs' case (as plaintiffs assert he was obligated to do) and accompanied them to court on the day the case was settled, the case would not have been handled differently. In fact, in light of Mr. Conway's statement that he recommended that plaintiffs give "serious consideration" to payment of a nominal amount, there is a possibility that if he had personally represented plaintiffs at the last stages of settlement, the amount recovered on their behalf would have been substantially less than the amount actually recovered.

Further, plaintiffs are unable to point to any facts demonstrating that the result would have been more favorable if the case had not been settled. Given the

state of New York libel law when this case was called for trial, there is a strong liklihood that defendants would have been entitled to a directed verdict at the close of the plaintiffs' case.

In Chapadeau v. Utica Observer, 38 N.Y. 2d 196, 379 N.Y.S.2d 61 (1975), the Court of Appeals held that in libel actions involving matters of public concern, plaintiffs have the burden of showing that the reporter acted in a "grossly irresponsible manner." Id. at ___, 379 N.Y.S.2d at 64. In Gaeta v. New York News, Inc., 62 N.Y.2d 340, 447 N.Y.S. 2d 82 (1984), the Court strictly applied the gross irresponsibility standard previously articulated. Specifically, in Gaeta, the Court held that articles regarding the particular circumstances surrounding the hospitali-

zation and transfer of a mental patient to a nursing home constituted a matter of legitimate public concern. Id. at ___, N.Y.S. 2d at 85-86. The Court then Considered whether the reporter's reliance on one source - the patient's sister - was gross irresponsibility. The Court concluded that such reliance was not gross irresponsibility. Finally, the Gaeta Court explained that because the gross irresponsibility test is an objective one, summary judgement thereunder may be appropriate in certain circumstances. Id. at ___, 477 N.Y.S. 2d at 86. The Court held that summary judgement dismissing the complaint should have been granted therein because the plaintiff failed to come forth with any facts that would enable a jury to conclude that defendants were grossly

irresponsible.

Defendants correctly contend that the significance of the Gaeta case on plaintiffs' underlying action cannot be ignored. Plaintiffs simply assert in their opposing papers that Gaeta had no "relevance" to their underlying action. At oral argument, Mr. Broad attempted to distinguish Gaeta on its facts. Those factual distinctions are inconsequential, however.

After Gaeta, there is little doubt that Ms. Zhilinskaya's alleged family relationships would be relevant to the circumstances surrounding her death, and that those matters were of legitimate public concern. Thus, in the underlying action plaintiffs had the burden of showing that the reporter was grossly irresponsible, a burden they could not

sustain.

Unlike Gaeta, where the reporter had only one source, discovery revealed that the reporter in plaintiffs' underlying action had four different sources: the Albany County Coroner; the Albany City Police Department; Angelo Cuprill (one of Ms. Zhilinskaya's neighbors); and Mrs. Broad's former husband, Lef Levitin, and those sources corroborated each other. Sanders Deposition (12/30/82) at pp. 46, 55, 58-60. After further investigating the story, the reporter decided the story could be aired. At her deposition, the reporter explained her reasoning:

> "It's--every--the story of her life and depression had a commonality between what Caprill, Levitin and the police had said. There was no discrepancy in what people were saying the girl's life was like. If Levitin had disputed

> everything Caprill had said or if the police had not said to me yes, we've been out to investigate, there might have been some red flag that might go up for me that somebody might not be telling the truth here. But there was no reason for me to believe that.

Id. at 73. Therefore, based upon the foregoing, clearly plaintiffs would not have been able to show the necessary gross irresponsibility. Indeed, the facts of the plaintiffs' case were even more favorable to the reporter than in Gaeta, where the court found summary judgement proper because there was no showing of gross irresponsibility by that reporter. Thus, in light of Gaeta, it seems highly unlikely, if not impossible, that plaintiffs would have prevailed on their case at trial. See also, Robart v. Post-Standard, 74 A.D. 2d 963, 425 N.Y.S. 2d 891 (3rd Dep't 1980), aff'd, 52

N.Y.2d 843, 437 N.Y.S.D.2d 71 (1981) (Summary Judgement and dismissal of the complaint proper where reporter relied upon a reasonable source, the police, even though the information provided and published was inaccurate.)

Furthermore, even assuming plaintiffs had survived a motion for a directed verdict in the underlying action, they have not met their burden of showing actual damages, an essential element of a legal malpractice action. For example, in Becker v. Julien, et al., 95 Misc.2d 64 (Sub.Ct., N.Y.Co. 1977), mod'd on other grounds, 66 A.D. 2d 674 (1st Dep't 1978), appeal dismissed, 47 N.Y.2d 761 (1979), the court dismissed that portion of plaintiff's complaint alleging legal malpractice stating:

> Plaintiff has not made even the scantiest showing that the

> value of his claim, prior to the alleged "improvident and coerced" settlement exceeded $45,000. Indeed, there appears to be a strong possibility that his case might have been dismissed entirely.

Id. at ___, 406 N.Y.S. 2d at 414-15. Similarly, in Ressis v. Wojick, 105 A.D.2d 565 (3rd Dep't 1984), mtn. for leave to appeal denied, 64 N.Y. 2d 609 (1985), the court dismissed plaintiff's complaint alleging legal malpractice where plaintiff failed to allege, either in his complaint or in his affidavit in opposition to the summary judgement motion, any facts to justify an award of compensatory damages. The court reasoned, "Absent proof of actual damages, a claim for attorney malpractice is unsupportable." 105 A.D.2d at ___, 481 N.Y.S.2d at 509 (citation omitted). Here, the plaintiffs have also failed to come forth with any allegations tending to

show that they sustained actual damages as a result of defendants' alleged malpractice. Consequently, in the absence of such allegations, plaintiffs' legal malpractice claims must fail.

In conclusion, assuming arguendo that plaintiffs were coerced into settling the underlying action, nevertheless, plaintiffs have not sustained their burden of proof on this motion for summary judgement. Plaintiffs have failed to bring any facts to the court's attention showing that they would have been able to proceed or recover in a manner other than that which actually occurred. Additionally, plaintiffs have failed to make any allegations, either in their complaint or in their opposing papers which would establish that they sustained compensatory damages as a

result of defendants' alleged malpractice. Based on the foregoing, defendants' motion for summary judgement is granted with respect to plaintiffs' claims of legal malpractice.

III. Breach of Contract

Finally, to the extent plaintiffs have attempted to assert a breach of contract claim based upon the fact that Mr. Conway did not handle their case, plaintiffs have also failed to come forth with facts sufficient to support that claim. As discussed herein, there is absolutely nothing before this court showing that Mr. Conway would have handled plaintiffs' case any differently than did Mr. Iseman. Indeed, the evidence before this court is to the contrary. Mr. Conway specifically averred that he "would not have proceeded

differently if [he] had personally handled the plaintiffs' claim." Conway AFfidavit at paragraph 14. Moreover, plaintiffs have failed to put forth any evidence whatsoever showing that they sustained any damages due to Mr. Conway's failure to handle their case. In fact, as discussed above, it is entirely possible that if Mr. Conway had handled their case, plaintiffs might not have recovered as much as they did. Therefore, because plaintiffs have failed to put forth any evidence establishing breach of contract, defendants' motion for summary judgement is also granted with respect to that cause of action.

Accordingly, defendants' motion for summary judgement is granted in its entirety, and plaintiffs' complaint is hereby dismissed.

IT IS SO ORDERED.

DATED: December 23, 1987
Syracuse, New York

Neal P.McCurn

Neal P.McCurn
U.S. District Judge